

November 4, 2005

John Robertus
San Diego Regional Water Quality Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Via Email

RE: FILE NO. 02C-144 [401 CERTIFICATION FOR SAN MARCOS HIGHLANDS]

Dear Mr. Robertus,

Here find comments on the draft 401 Certification of the San Marcos Highlands dredge and fill discharges to the headwaters, ephemerals and upper reaches of Agua Hedionda Creek on behalf of Endangered Habitats League (EHL) and the Neighbors of San Marcos Highlands – a local neighborhood association. EHL is dedicated to the protection of the diverse ecosystems of Southern California and to sensitive and sustainable land use for the benefit of all the region's inhabitants. Thank you for your consideration.

Proposed Project and the Waters at Issue

The headwaters of Agua Hedionda currently connect two significant open space systems in the Unincorporated Area south of Buena Creek and North of Santa Fe Hills development in San Marcos. Headwaters flow south through San Marcos and Carlsbad before reaching the Agua Hedionda Lagoon and the ocean. In the instant case, applicant KB Homes and landowner Farouk Kubba propose development of 191 homes on property that now lies primarily in San Diego County, but have elected to pursue approvals through the City of San Marcos and annexation of this land into the City of San Marcos by the Local Agency Formation Commission (LAFCO).

Beneficial uses for Hedionda creek include designations: AGR, IND, MUN, REC 1&2, WARM, and WILD. In the lagoon, COMM, MAR, SPWN and RARE are added [Basin Plan P. 2-27, 2-47]. As the land in question is identified as the headwater of a significant system, the Regional Board is also informed by the California Wetlands Conservation Policy [Id. P. 5-9] as well as the State Board 401 Certification Program Scope and Strategy. The Carlsbad Watershed Management Plan¹ funded by the State Board provides additional watershed level water quality guidance on the Carlsbad Hydrologic Unit and impaired segments.² Noteworthy is the planned desalinization plant adjacent to the current Encina Power Plant to provide municipal drinking water from this Agua Hedionda delta system.

Our comments begin with procedural matters, and then, our substantive concerns on the draft 401 Certification as it relates to beneficial uses and resulting water quality.

¹ Carlsbad Watershed Management Plan, February, 2002.[Section 5.1 Plan Objectives]

² Clean Water Act §303d listing for Agua Hedionda Creek and Lagoon.

PROCESS LACKS COMPLETE PROJECT DISCLOSURE OF CEQA

Final environmental documentation in the CEQA process must be available for review by the Regional Board before certification³. Subsequent to the original application for the 401 Certification, multiple changes to the project have been proposed, with current changes outlined only in applicant's memorandums dated March 15, 2005 through October 22, 2005 to permitting agencies⁴. The changes may be material, requiring supplemental CEQA analysis before a final environmental document for the project proposed to be Certified is complete. Today, there is no public agency where a final San Marcos Highlands project plan – as proposed to be Certified - is available for public review. Post-CEQA material changes render an application incomplete.

Project Changes

Three changes have not been analyzed in a CEQA document. The project area has been expanded from the original project definition to include additional open space mitigation, and push the required wildlife corridor onto neighboring property. The headwaters pond – a spring-fed pond created by a 90-odd year old earthen spillway, is proposed to be reopened. Finally, the design of Las Posas Road submitted to the Corps of Engineers has not benefited from disclosure.

The proposed changes to the project have implications to beneficial uses that must be protected by the conditions of the 401 Certification. As a practical matter, however, the CEQA requirement in the Porter-Cologne Act goes to the scope of public notice, comment, policy maker review and approval required prior to Certification.

First, the wildlife corridor has moved to run east-west across and upgrade from the headwaters seep / spring. The needed corridor, key to the WILD beneficial use, has been shifted substantially off-site in several key areas. This precludes successful reserve design as noted by USFW. This also deviates from guidelines that place one half of the 1000' minimum corridor width on applicants land. Current proposed boundaries of the open space along with road and utility easement impacts to the proposed habitat corridor remain outside review.

Related concerns involve secondary fire egress access to the north (egress that would also impose additional load to the stormwater collection and basin). This access would now cut across the newly proposed wildlife corridor (as would future reach of Las Posas). These changes, affecting WILD beneficial uses, have been made without CEQA analysis.

The second change from the original CEQA analysis relates to the headwaters seep/spring pond. Now captured by earthen dam, the pond remained intact in the original CEQA project, but would now be opened. While applicant asserts that water quality benefits attend this proposal, it also has attendant hydrological impacts (watercourse velocity and volume impacts – particularly in storm events, scouring and downstream channel widening) to define and analyze as well as wildlife water source impacts. Informal public participation has greatly increased the Corps and the Regional Board staff's knowledge of this headwaters – source spring, flows, and water quality. Formal public notice and comment and policy maker review is warranted to allow all parties to analyze hydrology impacts to the downstream watercourse, and illuminate the decision. Beneficial uses WILD and REC-2 are issues here, as is water quality.

³ Cal. Water Code Div 7 §1058; CCR §3856(f) – See <http://ceres.ca.gov/wetlands/permitting/401.html>.

⁴ PCR's March 15, 2005, 8 ½ X 11 memorandum entitled "Updated Project Description."

Finally, the Corps of Engineers has required a design for Las Posas Road to Buena Creek be submitted in application for the 404,⁵ but no CEQA has been conducted on that element. Future design of the road is important to evaluate cumulative effects, since the project at hand involves funding the future road segment.

The project before you for Certification has not yet been made available for public review and comment, nor had local policy maker approval been informed by that disclosure. No supplemental CEQA findings on the project at hand have been made by the lead agency to provide the final environmental documentation on the instant project that the Regional Board need review before they may issue Certification. Thus, the application is incomplete. Denial of the 401 Certificate without prejudice is appropriate until the file can be made complete.

SUBSTANTIVE ISSUES OF BENEFICIAL USE PROTECTIONS REMAIN

Our review of the Regional Board record and the draft Certificate indicates beneficial use protection issues we would like to prepare complete substantive comments on, given sufficient project information. The file continues to lack the final Water Quality Management Plan and Habitat Mitigation Management Plan despite Regional Board staff requests of the applicant. Since the Regional Board Certificate is conditioned on these plans⁶, the application file should be completed by draft plans to allow public comment on the complete Certification. In the absence of a completed file, we hope to have another opportunity to review and complete comment on the plans, but direct your attention to these comments at present.

Limits per Basin Plan are Not Enough to Address Threat to Water Quality

Adding a substantial footprint of homes west, east and south of the headwaters introduces a considerable source of pollutants in close proximity to a sensitive water quality headwaters site. Mass grading the native ground that constitutes the bulk of the headwaters watershed is another significant concern. Stormwater will now be channelized and groundwater recharge that feeds the Headwaters spring will be reduced. Given the 303d listing downstream, and the scientific importance of headwaters to basin-wide beneficial uses, site specific requirements would need to be addressed to assure anti-degradation⁷.

Seasonal Restrictions on Grading when Headwaters are Disturbed Should Be Considered

Grading poses significant threat to water quality from sediment where creek segments south are 303d listed for the substance. The standard requirements of the Construction Stormwater permit are incorporated, but here, around a headwaters, there is no requirement that addresses sequencing of major grading operations during wet weather seasons. This project involves a 110' high cut where the substantial quantity of earthwork and native land disturbance might properly be addressed by seasonal restrictions to grading operations rather than the standard quantity restrictions. This may strengthen

⁵ Las Posas Road to Buena Creek has not enjoyed CEQA review. Las Posas northward is funded from the new homeowners in the Highlands. See the Community Service District requirements for prospective Highlands homeowners set forth in settlement agreement with Santa Fe Hills homeowners in the Regional Board file.

⁶ Draft 401 Certification, File No. 02C-144, Condition A.1.

⁷ 40 CFR 131.12; 40 CFT 131.10(o); State Board Resolutions 68-16.

prevention of sediment discharges before the diversion system is in place. Any seasonal approach should coordinate with USFW breeding season impacts to the gnatcatcher.

Corridors and NCCP Reserve Designs Essential to Beneficial Use by Wildlife

The USFW Biological Opinion identifies this project as incompatible with current planning efforts – the North County MSCP and successful habitat reserve design in the County of San Diego. While Corridor issues do not relate directly to water quality, preserving the wildlife beneficial use requires wildlife accessibility to the site as well as to the water source. Here, the water source is surrounded on three sides, and the proposed corridor to the large core habitat areas does not meet minimum width criteria.

A minimum width of 1,000 feet is identified in the guidelines for the San Diego program. The reduction to 500 feet was for applicant to provide same onsite, so that the balance could be provided in the future by adjacent property owners. The instant proposal provides only 120-140 feet of the proposed corridor on-site and proposes to acquire the remaining depth to total 400' foot on the remaining adjacent undeveloped area to the north, obviating future efforts to complete the desired 1000' corridor. US Fish and Wildlife has highlighted the conflict between the City of San Marcos and the County plan for the importance of habitat connectivity at this location. Guidelines for habitat corridors and sensitive environmental areas promulgated in 1991 were ignored in planning San Marcos Highlands. In contrast, the County proposes the whole of the Highlands area be Preapproved Mitigation Area - core to the North County Multiple Species Habitat Plan. Just as USFW recommended no 404 Certification be issued until several outstanding state NCCP program conflicts are resolved, neither should the 401 Certificate.

Habitat plans with sufficient core areas, wildlife corridors and plan connectivity across jurisdictions are integral to protecting the access of wildlife to water sources. To protect the WILD beneficial use of the headlands at issue, existing conflicts between habitat plans would be resolved to allow successful reserve design before this 401 Certification issues.

Headwaters Importance to Water Quality

It is striking that we have created a regulatory system that addresses the land use value of wildlife habitat, and yet, at a rare and valuable water quality element such as a headwaters, we have no official regulation to prohibit disturbance of the headwaters native watershed itself.

In the State Board's 401 Program Scope and Strategy, we want to highlight the "disproportionate importance" of headwater streams and wetlands in maintaining basin-wide beneficial uses, and highlight that following the typical "project-specific regulation alone will not achieve the water quality goals of the State."⁸ To achieve water quality, the headwaters deserve a more thorough analysis. Here, we reiterate our concern over the lack of information available regarding the headwaters pond and missing CEQA review of same. Questions remain, despite rumors of private studies on the quality of this water, there is no report or baseline available to the public.

Is the water impacted by agricultural runoff today or is it not? Will the valuable wetlands soils and seedbank from and around the headwaters spring pond be tested after the project is awarded, or simply

⁸ Page 3, Watershed Impacts, State Water Resources Control Board CWA §401 Water Quality Certification Program, §401 Program Scope and Strategy – See www.swrcb.ca.gov/csa401/docs/programscope_strategy.pdf

disposed of? How will the Regional Board discover and address water quality threats to this watershed if we do not investigate the facts presented by the water and sediment quality of the headwaters pond as it is today? In fact, how will we measure whether we live up to anti-degradation or if we have indeed improved water quality unless we have this baseline information?

The loss of over 5,000 linear feet of streambed is not inconsequential, but pales in comparison to the proposed 110' cut, mass grading of most of the native land watershed, the removal of the earthen spillway and the excavation of pond sediments at the headwaters. The Carlsbad Watershed Management Plan⁹ made the connection between water quality and headwaters protection predominant in their plan objective and action items, stating:

Protect Upland Headwaters Open Space: "Action Items" should strive to protect, restore, or enhance undeveloped open space in the headwaters of the watershed that will provide natural filtering capabilities for water runoff control and water quality improvements. The "Action Item" should focus on the purchase or transfer into public ownership or control as many of these resources as possible, including restrictive easements and other policies and management needed for protection. Integration with habitat conservation plans and open space planning is essential.

The Carlsbad Watershed plan discusses at length the importance of buffering streams, but there is no comparable protection scheme here that accounts for the disproportional contribution of a native headwaters to water quality. A careful basin-wide assessment of project impacts and the alternative jurisdictional land use plans that offer less adverse impact on the aquatic ecosystem¹⁰ is here appropriate to anti-degradation and maintaining or improving water quality.

Basin-Wide Analysis of Alternatives and Hydromodification are Consistent with Strategy Paper
Basin-wide analysis is needed here to protect the water quality of the entire basin. The proposed Certification highlights the challenge of the original land plan where development was concentrated on the most sensitive watershed and habitat resources of the site.

A sensitive subject, the interface between land use plans and water quality, but key because basin wide analysis reveals the bigger picture. Water quality engineers may proffer significant riparian mitigation and restoration on-site, but the project itself introduces major urban runoff challenges to the headwaters of an impaired system. Ninety percent (90%) capture of first flush stormwater where project related pollutants are the primary source, remains **more** pollution, despite monitoring limits and diversion. Hydromodification impacts of pond removal downstream have not yet been well documented for review, while velocity increases downstream are significant after the pond dam is removed. Future reaches of Las Posas Road have cumulative impacts to the watershed basin that have

⁹ In 2001, the California State Water Resources Control Board (SWRCB) issued a National Pollutant Discharge Elimination System (NPDES) Permit requiring a watershed based planning approach to avoiding and solving surface water quality problems. This permit issued to the cities in San Diego County, including those within the Carlsbad Hydrologic Unit, requires the cities to cooperate in solving water quality issues by taking a watershed based approach that may include amending general plans.

¹⁰ CCR §230.10 Restrictions on Discharge

not been addressed, despite funding for said roadway embedded in the instant San Marcos Highland project.

SUMMARY

Regional Board analysis of the proposed land plan against basic Porter-Cologne Act principles is key. The proposed Certification does not protect water quality or assure anti-degradation because a headwaters will be lost forever. Porter-Cologne declares that the Regional Board shall regulate to attain the highest water quality which is reasonable. Here, the Regional Board can recognize the proposed PAMA designation by the County on this land as an Area of Special Biological Significance, or endorse the Carlsbad Watershed Management Plan strategy for acquisition and preservation of these headwaters to further water quality.

Two significant funding sources are enroute. TransNet funding will need to mitigate wetlands impacts in this watershed, and the Desalinization project will also produce major mitigation funding for the watershed. The Neighbors of San Marcos Highlands are dedicated to prioritization of these funds to support water quality focused acquisition and restoration without attendant impacts of over-development.

Conclusion

Serious procedural and substantive water quality issues remain outstanding. Once City of San Marcos policy makers have provided this plan with a final CEQA document, and final draft Habitat Mitigation and Water Quality Management plans available from the applicant, citizens will have the complete record needed for final comment.

These comments were made as complete as possible to assist the Regional Board staff and policy makers in strengthening their regulatory 401 program through basin-wide analysis of the sensitive Headwaters of the Agua Hedionda Creek.

Sincerely,
NEIGHBORS OF SAN MARCOS HIGHLANDS

Lynne Baker

Lynne Baker, Esq